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Supreme Court, U.S.
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No. 95-346

In the Supreme Court of the United States

OCTOBER TERM 1995

UNITED STATES OF AMERICA, *PETITIONER*,

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY–THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL., *RESPONDENT.*

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

RESPONDENT WREN'S BRIEF IN OPPOSITION

JEFFRY K. FINER, *Counsel of Record*
Finer & Pugsley, P.S.
West 505 Riverside • Suite 600
Spokane, Washington 99201
(509) 455–3700

JEFFREY STEINBORN
Smith Tower • 30th Fl.
506 2nd Avenue
Seattle, Washington 98104

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RESTATEMENT OF THE QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment prohibits a civil proceeding for the *in rem* forfeiture of property alleged to be:

1. "involved in" an illegal money laundering transaction; or

2. "furnished or intended to be furnished" by a person in exchange for a controlled substance; or

3. "used or intended to be used to facilitate any violation" of the federal drug laws;

after the owners of the property were criminally punished for the narcotics and money laundering crimes giving rise to the forfeitures.

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SUMMARY OF ARGUMENT

Respondent Wren does not oppose *certiorari*. The government's petition, however, contains overstatements and errors that affect the scope of this Court's grant of review. Specifically, the Ninth Circuit held that the government "cannot now claim that this case involves *only* the forfeiture of illegal *proceeds*." (Pet. App. 21a, emphasis in the original). For the reasons set forth below, Wren argues that this Court should grant certiorari on the

issues as recited at page i, above, in Wren's Restatement of the Question Presented.

Respondent Wren adopts the Statement of the Case filed by co-respondent Charles Arlt. (Br. in Opposition, Arlt, pages 2-7).

I. THE CIRCUIT'S DECISION BROADLY APPLIES TO AN ENTIRE CLASS OF LITIGATION AND SHOULD BE REVIEWED

Respondent Wren agrees that the issues arising from the Ninth Circuit's opinion are of paramount importance. Counsel's experience with state and federal forfeitures following the publication of *United States v. $405,089.23* indicates that the opinion — along with consonant decisions in the Third, Fifth, Sixth, Seventh, and D.C. Circuits — profoundly affect private, state, and federal interests. Although *$405,089.23* involves only federal civil forfeiture under Titles 18 and 21, Amicus curiae have correctly noted that the impact of the Circuit's opinion may affect other governmental sanctions.

Petitioner and Amici have overstated, however, the significance of the split between the circuits. The circuits in opposition to *United States v. $405.089.23*, reached their conclusions prior to this Court's decision in *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994). Since *Kurth Ranch*, other circuits have adopted fundamental portions of *United States v.$405,089.23*. *See United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *petition for cert. pending*, No. 95-345 ; *United States v. Perez*, ___ F.3d ___ , 1995 WL 689385 (5th Cir. 1995). In each instance, the circuits have adopted the categorical test announced in *Austin v. United States*, 113 S.Ct. 2801 (1993).

At the latest count, six circuits have held that civil forfeitures under 21 U.S.C. § 881(a) are sufficiently punitive so as to constitute punishment for the purposes of the Double Jeopardy Clause. *See also United States v. Baird*, 63 F.3d 1213 (3rd Cir. 1995); *United States v. Torres*, 28 F.3d 1463 (7th Cir. 1994); and *United States v. Rhodes*, 62 F.3d 1449, 1452 (D.C. Cir. 1995).

Nevertheless, a split does exist and, even among the circuits in line with the Ninth Circuit's analysis, there are divisions involving secondary issues.[1]

II. THE GOVERNMENT'S "STATEMENT OF THE QUESTION PRESENTED" MISREPRESENTS THE *$405,089.23* PANEL'S EXPLICIT HOLDING REGARDING SO-CALLED "PROCEEDS"

Wren also challenges the government's and amici's characterization of the Ninth Circuit's decision. Both argue that the opinion bars forfeiture of "proceeds", "profits", or "contraband". See Pet. at 10-11; Amicus, at 2. This is not what the panel held.

Responding to the same characterization, the panel noted that the texts to 21 U.S.C. 881(a)(6) and 981(a)(1)(A) were *not* limited to profits, return on investment, or proceeds:

> * * * the government misrepresents the sweep of the forfeiture statutes it invokes in this case. Despite the government's argument, the

[1] E.g., the court in *Ursery* criticized the Ninth Circuit's categorical rule determining that serial civil forfeiture and criminal prosecutions were not a single proceeding. *Ursery* held that the issue must be determined on a case–by–case analysis. *Ursery*, 59 F.3d at 575. *Ursery* also questioned the Ninth Circuit's application of double jeopardy analysis to 21 U.S.C. § 881(a)(6).

> statutes are not limited to the proceeds of illegal activity.

United States v. $405,089.23, 33 F.3d at 1221; Pet. App. at 20a. The panel then recited the specific statutory language of § 881(a)(6), to draw the distinction as plainly as possible. Regarding the money laundering statute, the opinion was even more emphatic:

> Because the government argued vigorously in the district court that § 981(a)(1)(A) is not limited to the proceeds of illegal activity, and it continues to rely on that statute in defending the district court's order of forfeiture, it cannot now claim that this case involves *only* the forfeiture of illegal *proceeds*.

United States v. $405,089.23, 33 F.3d at 1222 n. 12; Pet. App. at 21a, (emphasis in the original).

The government urged a broad legal justification for the forfeiture of Wren's and Arlt's cash, aircrafts, vessle, precious ore, and vehicles.[2] It now seeks to restrict this Court's review to the "remedial" disgorgement of "proceeds", or even more narrowly to "profits." The forfeiture statutes do not support such a crabbed review, nor would the artificially narrowed proceeds theory free this Court from the fact-bound record presented at summary judgment and reviewed by the Ninth Circuit. The issue facing this Court is not whether disgorging "proceeds" is proportionate and remedial under *United States v. Halper*, 490 U.S. 435 (1989) but whether forfeitures under § 881(a)(6) and § 981(a)(1)(A) are categorically punishment under *Austin*.

[2] See for example, the government's Statement of Conclusions of Law, ¶ 68-72. (Pet. App. 70a-72a).

CONCLUSION

The petition for *certiorari* should be granted and directed to the issues set forth in Section II and the Restatement of the Question Presented, above.

Respectfully submitted.

JEFFRY K. FINER
Spokane, Washington
Counsel of Record

JEFFREY STEINBORN
Seattle, Washington

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